

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CR2012-149764-001 SE

04/17/2013

HON. DAWN M. BERGIN

CLERK OF THE COURT  
B. Navarro  
Deputy

STATE OF ARIZONA

WILLIAM TATTNALL RUSH

v.

SOLAGUAHIRE ZENIL CORDERO (001)

CHRISTOPHER MANBERG

**UNDER ADVISEMENT RULING**

The Court has reviewed: (1) the Defendant's Motion to Suppress Statements based on a violation of *Miranda* and the State's Response; (2) the Defendant's Motion to Suppress based on a Fourth Amendment violation and the State's Response; and (3) the Defendant's Request for a Voluntariness Hearing. On April 12, 2013, the Court held an evidentiary hearing on these motions and now makes the following findings and orders.

**Factual Background**

On April 22, 2012, Officer Turken from the Department of Public Safety was stationed near an intersection where a "no right turn on red" sign was posted. He observed the defendant make a right turn on red and pulled her over. She had two passengers with her, one next to her and the other in the back seat. Officer Turken asked the defendant for a driver's license, proof of insurance and registration. The defendant produced the registration, but acknowledged that she had no driver's license and was unable to produce proof of insurance. When asked by Officer Turken for another form of identification, the defendant produced a Mexican Consular Card that bore her photo, date of birth and address. The card identified her as a citizen of Mexico. Officer Turken asked if she had any other forms of identification with her and the defendant responded that she did not.

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Officer Turken asked the defendant additional questions during the initial encounter and learned that she worked at a retail store called Aeropostale located in a mall. He then asked the passengers (who turned out to be defendant's minor cousins), if they had any form of identification. When they responded that they did not, he asked them for their names and dates of birth. The passengers told Officer Turken that they were brothers, but he disbelieved them because the birthdates they provided were only 5 months apart. He also perceived them to be nervous because they would not look him in the eye. Officer Turken then called for backup to monitor the scene while he questioned the passengers outside the presence of the defendant. He asked the defendant to step out of the car and accompany him to his patrol car where he placed her in the back seat.

Officer Molter from the Department of Public Safety arrived within about five minutes. He stood by while Officer Turken asked the passengers additional questions. The passengers disclosed that they attended high school in Tempe and admitted that they were in the country illegally. Officer Turken tried to alleviate the passengers' nervousness by telling them that he was not an immigration officer and was just trying to find out what was going on.

Officer Turken returned to his patrol vehicle, where the defendant remained seated in the back seat. He got in the car and ran a records check on the defendant and the two passengers. He found a record for the defendant indicating that she had no driving privileges in Arizona. The record also reflected the defendant's name and date of birth, and she acknowledged that she had previously lived at the address on the record. Officer Turken found no records for the two passengers. He prepared a citation for the defendant's civil traffic violation and for driving on a suspended license. After he printed the citation, he had the defendant exit the vehicle. At that time, for purposes of completing the citation, he asked the defendant for her social security number. She asked whether she had to answer the question and he told her no. At some point during the encounter, he asked her how she could be working if she had no social security number. Neither Officer Turken nor the defendant could recall her response.

Officer Turken explained the citation to the defendant and then took two photos of her. He testified that he took the photos both for identification purposes and for an investigation he planned to conduct regarding the possibility that the defendant had used fraudulent documents to obtain employment. At about this time, an inventory of the defendant's vehicle was occurring and he briefly spoke to her about that. He then let the defendant leave. About five minutes passed between Officer Turken providing the citation to the defendant and her departure.

Neither Officer Molter nor the defendant could recall him ever speaking to her. He testified that he may have spoken to the passengers, but if he did, it would have been only small talk.

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The following day, Officer Turken contacted ICE for information on the defendant. He was told that ICE had no record of the defendant entering the country or having authorization to work here. Officer Turken then went to Aeropostale and requested the defendant's employment records. He was told they could not be released without a court order. After securing a grand jury subpoena, Officer Turken obtained defendant's I-9 form and her W-2. The I-9 form indicated that at the time she was hired, the defendant presented a passport and a visa with an alien authorization number. The I-9 also contained a social security number. Officer Turken contacted ICE and was advised that the alien registration number belonged to someone else and the social security number had not been issued to anyone in the United States.

On or about July 2, 2012, Officer Turken, accompanied by Officer Jacobs, went to Aeropostale, where they found the defendant working. Officer Turken asked her if she would step outside for a few minutes to talk to him. She agreed. Officer Turken testified that he asked her to exit the store because he did not want to question the defendant in front of her colleagues or within their earshot. He showed the documents to the defendant and asked her a number of questions. When he asked her whether she had authorization to work in the U.S., she asked whether she had to answer the question. Officer Turken told her she did not. At one point in the conversation, the defendant asked if she could talk to "someone" before answering more questions. Officer Turken told her he was conducting an interview and she had no obligation to talk to him. She continued to answer questions. Officer Turken ultimately found the defendant's responses inadequate and explained that he intended to submit his report to the County Attorney's Office for charging. Either Officer Jacobs or Turken then explained the "long form" charging process to her. The officers left, and the defendant was later arrested.

### **Legal Analysis**

The defense argues that all of the evidence in this case must be excluded because: (1) the defendant was "in custody" during the traffic stop and during the interview at the mall and was not advised of her *Miranda* rights; (2) her statements during the traffic stop and during the interview at the mall were not voluntary; and (3) Officer Turken violated her Fourth Amendment rights against unreasonable seizure by prolonging the traffic stop.

#### Alleged *Miranda* Violations

A law enforcement officer is required to read the defendant her *Miranda* rights prior to any custodial interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984). Officer Turken acknowledged that he did not read defendant her *Miranda* rights during either encounter. The

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defense argues the defendant was “in custody” during both encounters; therefore, Officer Turken’s failure to advise her of her *Miranda* rights requires suppression of her statements.<sup>1</sup>

In determining whether the defendant was “in custody,” the Court is to consider whether the defendant’s “freedom of movement is restricted to the extent that it would be tantamount to formal arrest or at least that a reasonable person would believe he was in police custody of the degree associated with formal arrest.” *State v. Zamora*, 220 Ariz. 63, 68, 202 P.3d 528, #533 (App. 2009). Arizona courts have long recognized that a traffic stop will generally not trigger the need for *Miranda* warnings, even if the person is not free to leave, because a traffic stop is “presumptively temporary and brief” and the “circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.” *Berkemer v. McCarty*, 468 U.S. 420, 437-38 (1984).

Officer Turken’s initial encounter with the defendant was nothing more than a routine traffic stop. That he asked her questions about her employment or that she was nervous about him possibly asking her questions about her legal status in the U.S. is completely immaterial to an “in-custody” analysis.

The defense also argues that the defendant was “in custody” when Officer Turken placed her in his patrol vehicle, noting that the back passenger door of the patrol vehicle automatically locked from the inside when he closed the door. The Court again disagrees with the defense. Officer Turken did not place the defendant in his vehicle to interrogate her, but rather to have the opportunity to question the passengers separately about their identities. He even explained that to the defendant as he walked to the patrol vehicle with her. Further, Officer Turken was polite, never touched or cuffed the defendant, and the defendant’s stay in the vehicle was not prolonged. And, the defendant testified that she did not even know the door was locked. Under these circumstances, Officer Turken’s placement of the defendant in his patrol vehicle did not restrict her freedom of movement to the extent that a reasonable person “would believe [she] was in police custody of the degree associated with a formal arrest.” *Zamora*, 220 Ariz. at 38, 202 P.3d at 533.<sup>2</sup>

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<sup>1</sup> The Court finds it difficult to ascertain which of defendant’s statements at the traffic scene the defense contends constitute a confession or a self-incriminating statement. The defendant telling Officer Turken that she worked at Aeropostale is not a confession or incriminating statement. The defendant did not answer Officer Turken’s question about whether she had a social security number, and the State has agreed that her refusal to answer the question is not admissible at trial, and no one could remember how the defendant responded to Officer Turken’s question about how she could obtain employment without a social security number.

<sup>2</sup> Even if the defendant could be considered to have been “in custody” while in Officer Turken’s vehicle, he did not “interrogate” her during that time. Rather, he simply asked her questions related to the traffic stop, and the defendant made no inculpatory statements while in the car.

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The defendant was also not “in custody” from the time she got out of the patrol vehicle through the rest of the encounter. During that time period, Officer Turken was taking the final steps to effectuate the purpose of the stop—a citation for the defendant’s traffic violation.

With respect to the interview at the mall, again, there were no objective indicia of arrest present. Although Officer Turken was in uniform and accompanied by another officer, he politely asked the defendant to step outside to talk to him. He conducted the interview in a public area. The interview was not prolonged and Officer Turken never made any threats or shows of force. He even told the defendant during the interview that she had no obligation to talk to him.

**THE COURT FINDS** that the defendant was not “in custody” during the traffic stop or during the interview at the mall and was therefore not entitled to a reading of her *Miranda* rights.

Voluntariness of Defendant’s Statements

Confessions are presumed to be involuntary, and the State must prove by a preponderance of the evidence that a confession was freely and voluntarily given and “not the product of physical or psychological coercion.” *State v. LaGrand*, 153 Ariz. 21, 26, 734 P.2d 563, 568 (1987). The Court must objectively evaluate police conduct to determine whether any coercion was used, and the finding of voluntariness must be based on the totality of the circumstances. *State v. Conde*, 174 Ariz. 30, 35, 846 P.2d 843, 848 (App. 1992).

Arizona law also requires the Court to consider the following specific factors in determining whether a confession is voluntary:

1. The time that elapsed between the arrest and arraignment and the confession;
2. Whether the defendant knew the nature of the suspected or charged offense when questioned;
3. Whether the defendant was advised that she was not required to make any statements and that any statements she did make could be used against her;
4. Whether the defendant was advised prior to questioning of her right to counsel; and
5. Whether the defendant had counsel present when questioned.

A.R.S. §13-3988(B).

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As outlined above, Officer Turken never threatened, coerced or touched the defendant.<sup>3</sup> He was polite. He told her she did not have to answer questions or cooperate with him. He conducted the interviews in public places.

The defense emphasized the dramatic difference between Officer Turken's height and weight and that of the defendant. But, there was no testimony that Officer Turken used his superior height and weight to intimidate the defendant in any way. The defense also focused on the presence of Officer Molter at the traffic stop and Officer Jacobs at the mall interview as intimidating factors. Again, however, there was no testimony that either of those officers touched the defendant, threatened her or made her any promises. Moreover, neither Officer Molter nor Officer Jacobs asked the defendant any questions. Officer Molter was there for backup and Officer Jacobs came along to assist, but not to participate in the interview. The mere presence of two officers during an interview does not render a defendant's confession involuntary.

The Court found the defendant's memory of her encounters with Officer Turken, both at the traffic stop and at the mall, to be remarkably vague. Her testimony was also extremely tentative; she provided no testimony to support an argument that Officer Turken intimidated or coerced her or made her any promises. In fact, it appeared that much of her nervousness was related to a concern that he would ask her questions about her legal status in the U.S. Further, there was nothing in her demeanor on the stand that gave the Court the impression that she was afraid of Officer Turken or felt threatened in any way.

Consideration of the statutory factors also weighs in favor of a finding of voluntariness. The defendant clearly knew during the mall interview that Officer Turken suspected her of using forged documents to obtain employment since he presented them to her and questioned her about them. And, as noted, Officer Turken informed the defendant during the traffic stop and the mall interview that she did not have to talk to him. While he did not advise the defendant of her right to counsel before interviewing her, and counsel was not present during the interview, those facts are insufficient to overcome all of the other circumstances supporting voluntariness.

Considering all of the circumstances presented to the Court, including the statutory factors in §13-998(B),

**THE COURT FINDS** that the State has proved by a preponderance of the evidence that any statements by the defendant were made voluntarily.

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<sup>3</sup> In response to a question by defense counsel, the defendant even admitted that Officer Turken *asked* her, rather than *told* her, to step outside the store.

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Alleged Unreasonable Extension of Traffic Stop

In arguing that Officer Turken violated Defendant's Fourth Amendment rights by prolonging the traffic stop, the defendant focuses on Officer Turken's question about working without a social security number and his photographing of the defendant at the end of the encounter.

While Officer Turken's question about how the defendant could work without a social security number might not have been necessary to effectuate the purpose of the stop, it did not prolong the stop. He asked her the question in the course of completing the steps necessary to prepare a citation.

With respect to the photos, Officer Turken testified that he took them for two purposes: (1) identification of the defendant since she did not have a license and he had returned her Mexican Consular Card; and (2) to use in an investigation into her possible use of forged documents to obtain employment. Because one of the purposes for taking the pictures was directly related to the traffic stop, the defense argument that Officer Turken unreasonably delayed the stop to take the photos fails. Furthermore, taking the photos could not have lasted more than a couple of minutes, which would be a *de minimus* extension in any event. *Cf. State v. Teagle*, 217 Ariz. 17, 170 P.3d 266 (App. 2007).

**THE COURT FINDS** that there was no unreasonable seizure and therefore no violation of the defendant's Fourth Amendment rights.

**THE COURT FINDS** that the State has proved by a preponderance of the evidence that all of the evidence obtained by Officer Turken was obtained lawfully.

**IT IS THEREFORE ORDERED** denying the Defendant's Motions to Suppress.

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.